

**B.C., Appellant**

**U.S. POSTAL SERVICE, POST OFFICE,  
Chicago, IL, Employer**

**Issued: April 14, 2017**

### Case Submitted on the Record

VALERIE D. EVANS-HARRELL, Alternate Judge

<sup>3</sup> Appellant timely requested an oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). By order dated February 9, 2017, the Board exercised its discretion and denied the request, finding that the arguments presented on appeal could adequately be addressed based on review of the case record. *Order Denying Oral Argument*, Docket No. 16-1404 (issued February 9, 2017). The Board's *Rules of Procedure* provide that any appeal in which a request for oral argument is not granted, the Board will proceed to a decision based on the case record and any pleadings submitted. 20 C.F.R. § 501.5(b).

## **ISSUE**

The issue is whether OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant contends that OWCP has mismanaged her claim for 30 years and violated FECA when, without explanation, it transferred her medical care from her attending physician to a second opinion physician on October 9, 1986 without allowing her an opportunity to select a new physician. She also argues the merits of her case.

## **FACTUAL HISTORY**

This case has previously been before the Board. The facts and circumstances outlined in the prior Board decisions are incorporated herein by reference. The relevant facts are set forth below.

OWCP accepted that on May 7, 1985 appellant, then a 28-year-old letter sorter machine operator, sustained cervical and lumbar strains, and left hip and left ankle strains as a result of slipping and falling down a flight of stairs at work in a claim assigned File No. xxxxxx086. It later accepted that she sustained a recurrence of disability on July 24, 1985. In a claim filed under File No. xxxxxx103, OWCP accepted that appellant sustained cervical and thoracic strain, and left trapezius myositis while in the performance of duty on July 24, 1985. It combined File Nos. xxxxxx086 and xxxxxx103 with the former serving as the master file.

By decisions dated September 14, 2000, August 4, 2003, and February 9, 2005, the Board affirmed OWCP's nonmerit decisions denying appellant's requests for reconsideration regarding a denial of recurrence of disability as they were untimely filed and failed to demonstrate clear evidence of error.<sup>4</sup>

In a notice dated December 8, 2006, OWCP proposed to terminate medical benefits and entitlement to future wage-loss compensation based on evidence from Dr. Mukund Komanduri, a Board-certified orthopedic surgeon selected as the impartial medical specialist, who opined that appellant no longer had any residuals of her accepted May 7 and July 24, 1985 employment injuries.

In a January 18, 2007 decision, OWCP finalized the termination of appellant's medical benefits and entitlement to future wage-loss compensation based on Dr. Komanduri's impartial medical opinion. Appellant requested a hearing. An OWCP hearing representative affirmed the termination by decision dated November 15, 2007. He found that Dr. Komanduri's impartial medical opinion was entitled to special weight. On December 18, 2007 appellant appealed to the Board.

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<sup>4</sup> Docket No. 99-0958 (issued September 14, 2000), *Order Denying Petition for Reconsideration*, Docket No. 99-0958 (issued June 5, 2001); Docket No. 03-0956 (issued August 4, 2003); Docket No. 94-1741 (issued February 9, 2005).

In a May 9, 2008 decision,<sup>5</sup> the Board affirmed the January 18 and November 15, 2007 termination decisions. The Board found that OWCP had met its burden of proof to terminate appellant's medical benefits and entitlement to future wage-loss compensation based on Dr. Komanduri's impartial medical opinion. The Board also found that appellant had failed to establish that she had any continuing employment-related residuals after January 18, 2007.

By order dated April 15, 2009 in File No. xxxxxx827, the Board remanded the case for consolidation of appellant's prior claims.<sup>6</sup> Following the remand, OWCP denied appellant's requests for reconsideration because the requests were untimely filed and failed to demonstrate clear evidence of error. A December 15, 2011 OWCP decision was appealed to the Board. In a March 13, 2012 decision, the Board affirmed the denial of appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.<sup>7</sup> Appellant continued to request reconsideration and, following a March 18, 2013 OWCP decision, she again appealed to the Board. In an order dated May 16, 2014, the Board found that OWCP had improperly designated appellant's request for reconsideration from its denial of recurrence of disability rather than from its termination decision and, consequently, had not addressed the relevant issue.<sup>8</sup> The Board remanded the case for OWCP to correct its procedural error.

Upon remand from the Board's May 16, 2014 order, OWCP issued a July 1, 2014 decision which denied appellant's request for reconsideration of its January 18, 2007 termination decision. It found that the reconsideration request was untimely filed and failed to demonstrate clear evidence of error.

Appellant filed additional requests for reconsideration and appealed August 22, September 23, and December 8, 2014 OWCP decisions to the Board. By decision dated January 28, 2016, the Board found that OWCP properly denied appellant's requests for reconsideration because they were untimely filed and failed to demonstrate clear evidence of error.<sup>9</sup>

Subsequent to the December 8, 2014 OWCP decision, appellant continued to submit letters asserting that OWCP erred regarding the selection of the treating physician and in its management of her claim.

In letters received February 16 and March 1, 2016, appellant again requested reconsideration of OWCP's January 18, 2007 termination decision. She contended that OWCP failed to follow remand instructions in a prior OWCP decision to refer her back to

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<sup>5</sup> Docket No. 08-0571 (issued May 9, 2008).

<sup>6</sup> *Order Remanding Case*, Docket No. 09-42 (issued April 15, 2009). Appellant had appealed April 24 and October 2, 2008 decisions in File No. xxxxxx827, in which OWCP denied her claim for an alleged November 7, 1986 injury as untimely filed.

<sup>7</sup> Docket No. 12-0554 (issued March 13, 2012), *Order Denying Petition for Reconsideration*, Docket No. 12-0554 (issued September 14, 2012).

<sup>8</sup> *Order Remanding Case*, Docket No. 13-1824 (issued May 16, 2014).

<sup>9</sup> Docket No. 15-0550 (issued January 28, 2016).

Dr. Komanduri for another impartial medical examination. Appellant also contended that Dr. Komanduri's report was incomplete as he did not answer all the questions posed by OWCP. She asserted that her claim was tainted because OWCP sent telephone conversation transcripts to Dr. Komanduri regarding her conversations with OWCP about him, which caused him to call her ignorant. Appellant submitted letters dated February 20 and 24 and March 9, 20, and 28, 2016 in which she maintained that OWCP terminated her compensation without any evidence to establish that her employment-related residuals and disability had ceased. She further maintained that it had not designated a physician of record since it had terminated her prior physician. In an April 3, 2016 letter, appellant asserted that OWCP ignored medical reports submitted by her physician in 2012, 2013, 2014, and 2015 who noted that her preexisting unspecified connective tissue condition was aggravated by her work injury.

By decision dated April 5, 2016, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>10</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>11</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>12</sup>

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's application for review is untimely filed, it must nevertheless undertake a limited review to determine whether it establishes clear evidence of error. If an application demonstrates clear evidence of error, OWCP will reopen the case for merit review.<sup>13</sup>

To demonstrate clear evidence of error, a claimant must submit evidence that is relevant to the issue that was decided by OWCP,<sup>14</sup> is positive, precise, and explicit, and manifests on its face that OWCP committed an error.<sup>15</sup> The evidence must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must also shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision for which review is sought. Evidence that does not raise a substantial question is insufficient to demonstrate clear evidence of error. It is not enough

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<sup>10</sup> 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

<sup>11</sup> 20 C.F.R. § 10.607(a).

<sup>12</sup> *E.R.*, Docket No. 09-599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>13</sup> *M.L.*, Docket No. 09-956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (September 2011) (the term clear evidence of error is intended to represent a difficult standard).

<sup>14</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>15</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

merely to show that the evidence could be construed so as to produce a contrary conclusion. A determination of whether the claimant has demonstrated clear evidence of error entails a limited review of how the evidence submitted with the reconsideration request bears on the evidence previously of record.<sup>16</sup>

### **ANALYSIS**

On February 16, 2016 appellant requested reconsideration regarding the termination of her wage-loss compensation and medical benefits. The Board finds that, as more than one year elapsed between the most recent merit decision on the termination issue, the Board's May 9, 2008 decision, affirming the termination of all medical benefits, and appellant's request for reconsideration received by OWCP on February 16, 2016,<sup>17</sup> her request for reconsideration was untimely filed.<sup>16</sup>

The Board also finds that appellant failed to demonstrate clear evidence of error. On reconsideration appellant maintained that OWCP failed to follow remand instructions in a prior OWCP decision to refer her back to Dr. Komanduri for another impartial medical examination. There is no evidence of record supporting this assertion. Thus, appellant has not demonstrated clear evidence of error by OWCP.

Appellant also maintained that OWCP terminated her compensation benefits without any evidence to establish that her employment-related residuals and disability had ceased. She contended that Dr. Komanduri's report was incomplete as he did not answer all the questions posed by OWCP. Contrary to appellant's contentions, the Board, as noted, previously found that the opinion of Dr. Komanduri was entitled to special weight and established that appellant no longer had any residuals or disability causally related to her accepted May 7 and July 24, 1985 employment injuries. Consequently, her contentions are insufficient to demonstrate clear evidence of error by OWCP.

Appellant further contended that her claim was tainted because OWCP sent Dr. Komanduri transcripts of telephone conversations between herself and OWCP regarding him, which resulted in him calling her ignorant. OWCP procedures provide that the referee physician or impartial medical examiner should be provided with a statement of accepted facts and a list of pertinent questions or issues to be addressed, which should include a statement outlining the conflict(s) for resolution in the case. The physician should also receive a copy of the entire case record.<sup>18</sup> OWCP properly followed its procedures and provided Dr. Komanduri a copy of the case record, which included memoranda of telephone calls (Form CA-110).

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<sup>16</sup> *J.S.*, Docket No. 10-385 (issued September 15, 2010); *B.W.*, Docket No. 10-323 (issued September 2, 2010).

<sup>17</sup> Appellant had one year to request reconsideration following the issuance of the Board's May 9, 2008 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (October 2011, February 2016) (a right to reconsideration within one year accompanies any subsequent merit decision, including any merit decision by the Board).

<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810(11)(c) (September 2010).

Consequently, appellant's contention does not raise a substantial question as to the correctness of OWCP's decision.

Appellant also contended that OWCP ignored reports from her physicians which established that her preexisting unspecified connective tissue condition was aggravated by her work injury. The Board has held that evidence of the nature of any disabling condition and its relationship to a particular employee's work can only be given by a physician fully acquainted with the relevant facts and circumstances of the employment injury and the medical findings.<sup>19</sup> As a lay person, appellant is not competent to render a medical opinion and, therefore, her opinion has no probative value on a medical issue.<sup>20</sup> Moreover, appellant did not specifically identify the reports allegedly ignored by OWCP. The Board finds, therefore, that her general contention is insufficient to demonstrate clear evidence of error on the part of OWCP.

Appellant further asserted that OWCP had not designated a physician of record since it had terminated her prior physician. This assertion is not relevant to the underlying issue in this case, whether appellant had any continuing residuals or disability causally related to her accepted May 7 and July 24, 1985 employment injuries. In order to establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>21</sup>

Thus, the Board finds that the arguments submitted on reconsideration do not raise a substantial question as to the correctness of OWCP's decision terminating appellant's medical benefits. Consequently, OWCP properly found that the untimely reconsideration request did not demonstrate clear evidence of error.

On appeal appellant contends that OWCP has mismanaged her claim for 30 years and violated FECA because it transferred her medical treatment from her attending physician to a second opinion physician on October 9, 1986 without allowing her an opportunity to select a new physician and failed to provide an explanation for such action. As stated, however, the underlying issue is whether OWCP properly terminated her medical benefits because she no longer had any residuals or disability causally related to her accepted May 7 and July 24, 1985 employment injuries. The Board finds that appellant's argument is not relevant to this issue.

Appellant also argues the merits of her case on appeal. However, as noted above, the Board does not have jurisdiction over the merits of the case. Appellant has not presented evidence or argument that raises a substantial question as to the correctness of OWCP's termination decision for which review is sought.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

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<sup>19</sup> See *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>20</sup> See *James A. Long*, 40 ECAB 538 (1989).

<sup>21</sup> *Supra* note 14.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 5, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 14, 2017  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board